MAR 15 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Misc. No. 1100

KALMAN GREENHILL AND FRANK PROCTOR, JR., *Petitioners,*

v.

RICHARD T. RIVES, BEN F. CAMERON, and GRIFFIN B. BELL, Circuit Judges of the United States Court of Appeals for the Fifth Circuit, *Respondents.*

On Conditional Motion for Leave to File a Petition for a Writ of Mandamus and Petition for a Writ of Mandamus

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners submit this supplemental brief to call to the Court's attention two new and conflicting decisions:

(a) *Brown* v. *United States,* rendered by the Court of Appeals for the Ninth Circuit on February 18, 1963; and

(b) *Parrott* v. *United States*, decided by the Court of Appeals for the Tenth Circuit on February 8, 1963.

Those unreported decisions were unavailable to petitioners at the time of filing the certiorari petition and the mandamus motion on February 23, 1963. They are reprinted in full pertinent part in the Appendix hereto, *Brown* at p. 1a, *infra*, and *Parrott* at p. 8a, *infra*.

(a) The Brown Case

In recognizing the need for taking some corrective action in light of a conceded violation of the Court Reporter Act, the Ninth Circuit in *Brown* has rendered a decision contrary to that of the Fifth Circuit in the instant proceeding in several respects:

1. *Brown* holds that the minimum "appropriate procedure"—even where no error in the summation has been suggested—is to vacate the judgment of conviction and to remand for a hearing to determine whether the defendant was in fact prejudiced by the failure to record the final arguments. Development of the relevant facts, including a reconstruction of the summation to the extent possible, thereby permits a more meaningful resolution of the impact of the reporter's statutory violation.

But in the instant case, the Fifth Circuit has refused to permit such a hearing despite the uncontested allegations that prejudicial remarks were in fact made by the prosecutor in his unrecorded summation. The conflict between the two cases is heightened by the fact that the ingredient missing in *Brown*—the specification of error in the summation—is present in this case. The hearing required by *Brown* is thus all the more appropriate here.

2. In distinguishing the Fifth Circuit opinion in *Stephens* v. *United States*, 289 F. 2d 308, the Ninth Circuit in *Brown* notes that a new trial had been ordered in *Stephens* because the defendant there (who had not had counsel prior to the appeal) needed the unrecorded transcript in order to present "certain specified errors." The Ninth Circuit clearly implies that the drastic remedy of a new trial is justified where a specification of error has been made and where the absence of a record makes it impossible to fairly adjudicate that claim of error.* In these circumstances, a "denial of fundamental fairness" is created, requiring a new trial.

In addition, where the defendant has made allegations of serious error in the summation it is not likely that a mere hearing, without a new trial, will result in "a reasonably accurate estimate of the possibility of prejudice." The memories of the judge and opposing counsel may well differ, and no fair means exist to reconstruct what the prosecutor actually said. Hence, says *Stephens* as interpreted in *Brown*, a new trial becomes necessary.

But the important point is that *Brown* recognizes that something must be done where a violation of the Court Reporter Act has occurred. In failing to give such recognition, to the point of refusing even to permit the issue to be raised or a record developed, the decision below is directly in conflict with *Brown*.

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* Petitioners in this case, of course, have made serious and unchallenged allegations that the prosecutor overstepped proper bounds in his summation. See affidavits on file with the Clerk of this Court, in connection with the prior motion to vacate and remand, No. 145, Oct. Term, 1962, reprinted in that motion.

(b) The Parrott Case

The Tenth Circuit in *Parrott*, in reliance upon the Fifth Circuit's decision in *Stephens*, ordered the drastic demedy of a new trial simply because the reporter had failed to record the voir dire examination, during which the trial judge had allegedly made an improper statement. The damage done by the failure was held to be irreparable. The absence of the relevant portion of the transcript made it impossible for the Tenth Circuit "to determine whether the errors [in the voir dire examination] were harmless and should be disregarded because of Rule 52(a), F.R. Crim. P." Hence the conviction could not stand.

Here again is a clear recognition of the appellate frustration inevitably created by a violation of the Court Reporter Act. That recognition is what the court below has steadfastly refused to give in this case, and that refusal has created a conflict with all recorded decisions on the matter, including the *Parrott* case.

The sum of all these other cases, moreover, indicates that there is a strong interest by the federal judiciary in maintaining the efficacy of the appeal process and in enforcing the absolute command of the Court Reporter Act. That interest is plainly sufficient enough to overcome any consideration stemming from petitioners' failure to detect and challenge the statutory violation at the earliest possible moment. Cf. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 536.

It must also be noted that in this proceeding—far more so than in any other recorded case—the damage to the judicial process resulting from the reporter's dereliction of duty is openly obvious. The failure to record the summation has completely undermined the

determination of the court below that, having "carefully reviewed this record," there is "no reasonable basis for the claim that the prosecutor was too vigorous within the rule of *Berger* v. *United States*, 295 U.S. 78." 298 F. 2d at 411; see pp. 12-13 of petition for certiorari herein. Some form or avenue of relief must be accorded in order to restore the efficacy of the appellate process in this case.

Finally, to reiterate the uniqueness of the decision below in declining even to recognize an effort to cure so plain an error, the following comparative table of decisions is set forth, decisions which in one degree or another flatly contradict the ruling below:

	Court Reporter Act violation first raised in:	Effect of violation:	Relief:
Greenhill decision below	U. S. Supreme Court, on prior motion to vacate and remand.	Undermined efficacy of Ct. of Appeals opinion; nature of prosecutor's prejudicial comment has been alleged and not denied, and if allegations are true the judgment of conviction would be reversible	Denial of any hearing, let alone relief.
Brown decision of C.A. 9.	Court of Appeals.	Unknown. No allegation of error in summation.	Hearing to try to reconstruct summation and to determine any prejudice.
Parrott decision of C.A. 10.	After trial in the District Court.	Unrecorded voir dire examination made it impossible for Court of Appeals to determine whether alleged errors therein were harm.. under Rule 52.	New trial.
Fowler 310 F. 2d 66 (C.A. 5).	Court of Appeals.	Nature of prosecutor's possible prejudicial comment known, but without record cannot determine if reversal is required.	New trial.
Stephens 289 F. 2d 308 (C.A. 5).	Court of Appeals.	Made it impossible to adjudicate, under Rule 52(a), as to possible errors in prosecutor's summation and in examination of veniremen.	New trial.

	Court Reporter Act violation first raised in:	Effect of violation:	Relief:
Stansbury 219 F. 2d 165 (C.A. 5).	Court of Appeals.	Unrecorded bench conference, making a "supplemental record" necessary.	Reversed on merits of conviction.
Taylor 303 F. 2d 165 (C.A. 4).	Court of Appeals. in § 2255 proceeding.	Made it impossible to determine if sentence should be vacated.	Further hearing to determine what happened during unrecorded part of trial.
Poole 250 F. 2d 396 (App. D.C.).	Court of Appeals in § 2255 proceeding.	Unrecorded plea and imposition of sentence made it impossible to pass on § 2255 claim.	Court of Appeals ordered transcription and, on merits, vacated conviction.

CONCLUSION

For these various reasons, supplementing those expressed in the petition for a writ of certiorari, certiorari should issue in this proceeding or, alternatively, leave to file the petition for writ of mandamus should be granted and the writ thereupon issued.

Respectfully submitted,

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March 15, 1963.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17,782

Feb. 18, 1963

WILLIE FRANK BROWN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the Western District of Washington
Northern Division

Before: POPE, BROWNING and DUNIWAY, Circuit Judges

BROWNING, Circuit Judge:

Appellant was convicted of transporting Betty Joyce Lanuzza from Seattle, Washington, to Richmond, California, for the purpose of prostitution in violation of 18 U.S.C.A. § 2421. He seeks reversal upon two grounds.

I

[Part I of the opinion, dealing with evidentiary matters, is not here pertinent and hence is omitted.]

II

Appellant asserts that the judgment must be reversed because the court reporter failed to record the closing arguments of counsel in violation of the statutory command that "all proceedings in criminal cases had in open court" be recorded verbatim. 28 U.S.C.A. § 753(b)(1). Appellant has not suggested any error that may have occurred in the prosecuting attorney's summation. The sole error specified is the failure to record the summations; this

error, appellant argues, in itself requires reversal and a new trial.[1]

We do not agree. In reviewing criminal convictions on appeal we are to disregard "error . . . which does not affect substantial rights." Rule 52(a), Fed. R. Crim. P. If the closing arguments of counsel contained no error affecting appellant's substantial rights, then failure to record those arguments would also be harmless error. Appellant argues that since the summations were not recorded we cannot be sure. But we are not compelled to set aside a valid conviction because of an error which may have been wholly harmless in order to be sure that we are not, through ignorance of the facts, denying relief for error which prejudiced appellant's substantial rights. The trial judge, the prosecuting attorney, appellant's trial counsel, the reporter, and the appellant himself are all available, as also,

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[1] Appellant's argument would be without merit if presented in a collateral attack upon his conviction. Although the requirement of Section 753 (b)(1) that "all" proceedings in open court in criminal cases be recorded is mandatory (Stephens v. United States, 289 F. 2d 308, 309 (5th Cir. 1961)), we would think failure to record counsel's summation, without more, though error, "is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure" (Hill v. United States, 368 U.S. 424, 428 (1962)), and failure to record counsel's summation therefore would not, of itself, require the granting of collateral relief. However, if a denial of appellant's rights in some other respect were alleged, the absence of a record might be a significant factor in determining whether in all the circumstances there had been a denial of fundamental fairness. United States v. Taylor, 303 F. 2d 165, 169 (4th Cir. 1962). As the court held in *Taylor*, and as we indicated in Eddy v. United States, 256 F. 2d 78 (9th Cir. 1958), one possibility to be explored in a hearing on such a collateral attack would be whether a record sufficient to permit fair consideration of the alleged violations of defendant's rights could be reconstructed. Compare Macomber v. Gladden, 304 F. 2d 487, 490 (9th Cir. 1962).

no doubt, are other witnesses to what transpired. The appropriate procedure is to vacate the judgment and remand for a hearing to determine whether appellant was prejudiced by the error in failing to record the arguments. If the trial court concludes that he was, a new trial may be ordered. If the court concludes that he was not, a new final judgment may be entered. See *Remmer* v. *United States*, 347 U.S. 227 (1954). See also *Killian* v. *United States*, 368 U.S. 231, 241-44 (1961); *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233 (1957); *Ogden* v. *United States*, 303 F. 2d 724, 737-38 (9th Cir. 1962).[2]

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[2] As an appendix to its brief in this Court, the government submitted affidavits asserting that appellant's trial counsel did not object to the failure to record the closing arguments, nor to anything which the prosecutor said in his summation. If properly established, these facts would be relevant, for although plain error affecting substantial rights may be noticed despite defendant's failure to object (Rule 52(b), Fed. R. Crim. P.), "it is only where an error is seriously prejudicial that it will be noticed in the absence of objection." (Himmelfarb v. United States, 175 F. 2d 924, 950 (9th Cir. 1949)). "[P]ower to notice plain error not objected to will be exercised only to prevent a miscarriage of justice." (Schumacher v. United States, 216 F. 2d 780, 787 (8th Cir. 1954)). But they are not facts of record, and we may not consider them unless, and until, they are.

Judge Duniway's suggestion that the procedure outlined in Rule 75(n) of the Federal Rules of Civil Procedure was available to appellant by reason of Rule 39(b)(1) of the Federal Rules of Criminal Procedure is novel. It apparently did not occur either to appellant or to the government. Even if the suggested construction of the Rules were clearly correct, we think it would be inappropriate on direct appeal from a judgment of conviction in a criminal case to preclude review on the ground that appellant had conclusively waived error by failure to invoke so unfamiliar a remedy. The government has not contended for such a result. There is authority suggesting that even in a civil case, where the unreported portions of the record may be of substantial importance, the better practice is to remand under Rule 75(h) for supplementary proceedings so that the record "may conform to the truth," rather than to ignore error or attempt review on an incomplete record. See United States v. Chesapeake & O. Ry., 281 F. 2d 698, 701-02 (4th Cir. 1960).

Appellant argues that in *Stephens* v. *United States*, 289 F. 2d 308 (1961), the Court of Appeals for the Fifth Circuit adopted a rule which would require outright reversal in circumstances such as are presented here. We think *Stephens* is distinguishable. The court there stated that the defendant required the transcript of unrecorded proceedings to "properly present certain specified errors to this Court" (289 F. 2d at 309); in the present case, appellant has specified no error to which the closing arguments would be relevant. It also appears from the briefs and record in *Stephens* that defendant represented himself at trial; appointed counsel entered the case for the first time on appeal. This circumstance materially enhanced the likelihood that substantial error occurred in the unrecorded proceedings (which included the impaneling of the jury as well as closing arguments), and materially reduced the likelihood that a reasonably accurate estimate of the possibility of prejudice could be arrived at in a hearing if the case were remanded for that purpose.

Vacated and remanded for further proceedings.

POPE, Circuit Judge, concurring:

I concur fully in Judge Browning's opinion.

When, as here, there has been a complete disregard of a positive statutory command to record closing arguments, I find myself in a predicament. I do not want to order a new trial merely for want of this recording, in the absence of some proof of prejudice. And still, I know that if, in fact, government counsel made the kind of argument dealt with in Ginsberg v. United States, 5 cir., 257 F. 2d 950, 955, or in Wagner v. United States, 5 cir., 263 F. 2d 877, 884, I would seriously consider reversal for "plain error", whether objection was or was not made at the time. Compare Viereck v. United States, 318 U.S. 236, 248.

That any such thing happened is extremely unlikely, but but it is not impossible, as the cases cited show. Perhaps

the chances are only one in ten thousand, but since I believe that never, if we can possibly avoid it, should any man stand convicted where plain error occurs. I think we have taken here the only step that will make certain that appellant is assured a fair trial.

DUNIWAY, Circuit Judge, dissenting:

I dissent. I agree that the evidence is sufficient to support a finding that the woman was transported by the defendant, but I would not remand the matter for further proceedings relating to oral argument.

In *Irving* v. *United States*, 1931, 53 F. 2d 55, at 56, we said "that prejudice is not inferred from mere error, and that the burden is always upon an appellant to show that he has suffered damage in this case." To the same effect, *Didia* v. *United States*, 1939, 106 F. 2d 918, 920. There is a presumption that the District Court tried the case properly and that it protected the rights of the defendant, until the contrary is made to appear. This rule applies with particular force where it is claimed that there has been prejudicial misconduct in the argument of the prosecutor. *D'Aquino* v. *United States*, 1951, 192 F. 2d 338, 367.

Here, error does appear, in that the arguments of counsel were not taken down by the court reporter, but there is not even an assertion that if the argument had been taken down and brought before this court it would disclose any misconduct on the part of the prosecutor, or any other error, much less prejudicial misconduct or error. Furthermore, it would not be ground for reversal even if the prosecutor had been guilty of some misconduct in the course of his argument. There would also have to be objection, as this is the kind of error that is usually readily cured by admonition and instruction, if brought to the court's attention. It is also the type of error that is often deliberately waived by experienced counsel by failure to object, to avoid emphasizing the matter in the eyes of the jury. The miscon-

duct would have to be truly egregious to warrant reversal in the absence of objection.[1]

The rules of procedure provide a manner in which an appellant can bring before the court matters which occurred in the trial and of which no stenographic report was made. Rule 39(b) of the Federal Rules of Criminal Procedure provides that the rules and practice governing the preparation of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided. Rule 75(n) of the Federal Rules of Civil Procedure establishes a means for preparing a record when no stenographic report of the evidence or proceedings at a hearing or trial was made. This is comparable to the old bill of exceptions procedure, and an

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[1] We note that, before oral argument, the court advised the jury as follows:

> "At this time, as the Court previously indicated, we are to hear the arguments of Counsel making comments on the evidence and the probative effect of the evidence, and Counsel in the case have a right to make those comments so long as they are reasonably supported by the state of the evidence. That is to say, if there is any evidence to reasonably back up what Counsel is commenting and arguing, then they are entitled to have the jury consider all such reasonable arguments. If, however, there should turn out to be a conflict between Counsel's recollection and the jury's recollection as to what the facts are as established by the evidence, it is for the jury to find the facts."

Also, in the course of its instructions, the court told the jury:

> "Statements, if any, by Counsel or the Court, unsupported by your own recollections of the evidence, you will disregard. Likewise, you will disregard all statements made by Counsel and the Court to each other during the trial.
>
> "In your deliberations and in reaching a verdict you should act only upon the evidence which has been admitted and the law as it has been given to you by the Court."

No exception was taken to the charge by defendant's counsel.

appellant has always had a duty, and the burden, of seeing that a proper record is brought before the Appellate Court. There has been no attempt to bring the matter before this court in the prescribed manner or to show any reason why this could not be done.

Under these circumstances, it is my view that the appeal should be terminated now, and that there is no point in remanding the matter for the purpose of trying to discover prejudicial error when it is presumed in the absence of an affirmative showing that no such error exists.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7069—January Term, 1963

CHARLES HARTWELL PARROTT, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the Eastern District of Oklahoma

(February 8, 1963)

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The appeal is from a judgment of fine and imprisonment entered on a jury verdict finding the appellant-defendant guilty of conspiracy to rob a bank insured by the Federal Deposit Insurance Corporation. The only point deserving consideration is the effect of a statement by the trial judge in the voir dire examination of prospective jurors that 3 other charges of bank robbery were pending against the defendant.

The voir dire examination was not recorded. After discovery of this fact, counsel for the defendant filed a motion to complete the record and supported that motion with affidavits. The official court reporter then wrote defense counsel saying:

> "I beg to advise that it is not the practice to take voir dire examination of the jury, consequently my notes of the trial do not contain Judge Rizley's statement to the jury."

The statute requires the recording of "all proceedings in criminal cases had in open court."[1] This provision is mandatory and the court has the duty to require compliance.[2] A local rule or practice cannot override a statute of the United States.

The government does not deny that in the voir dire the trial judge mentioned the other bank robbery cases pending in the same court against the defendant but argues that the error was harmless. The unavailability of a full transcript because of the undisputed failure of the court reporter to comply with the statute makes it impossible for us to determine whether the errors were harmless and should be disregarded because of Rule 52(a), F.R. Crim. P. The Fifth Circuit has reached the same conclusion in a similar situation.[3]

Reversed and remanded for a new trial.

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[1] 28 U.S.C. § 753(b) provides in part: "One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; * * *." The importance of recording the voir dire examination is shown by such cases as Consolidated Gas & Equipment Company of America v. Carver, 10 Cir., 257 F. 2d 111, 113-114, where a judgment was reversed because of a false answer on voir dire.

[2] Poole v. United States, D.C. Cir., 250 F. 2d 396, 399.

[3] Stephens v. United States, 5 Cir., 289 F. 2d 308, 309.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners file this petition for rehearing of the orders of this Court, entered on April 15, 1963, denying the petition for a writ of certiorari in No. 859 and

denying the motion for leave to file a petition for writ of mandamus in Misc. No. 1100.

This petition is premised upon two intervening circumstances within the meaning of Rule 58(2):

(1) This Court's grant of certiorari on April 29, 1963, in *Hardy* v. *United States*, Misc. No. 783 (now on the Appellate Docket as No. 1060). The question presented for review in that case is stated in the petition as follows:

> "Whether a stenographic transcript containing only 'the testimony and evidence presented by the Government' is a record of sufficient completeness to enable court-appointed counsel for an indigent convict to make an adequate investigation of possible grounds of appeal."

(2) The pendency before this Court of the petition for writ of certiorari (filed on March 14, 1963, subsequent to the instant matters) in *Strauss* v. *United States*, No. 928. The second question presented in that petition, which seeks review of a Fifth Circuit judgment, is stated as follows:

> "Whether or not the failure of the trial court to have the entire proceedings reported and furnish a copy of such report to a defendant in a criminal case is error per se, and is a denial of due process of law under the Fifth Amendment of the Constitution of the United States."

Both of the above cases, at least one of which will be fully canvassed by this Court, reflect the growing concern with flagrant violations of the appeal rights of criminal defendants, whether they be indigent or not. The failure to record part of the trial in violation of the Court Reporter Act or the refusal to pro-

vide counsel or a defendant with the full transcript is so destructive of the appellate process and of the right to prosecute a meaningful appeal that corrective action must be taken by this Court. The instant case presents a significant facet of that problem, coupled as it is with an unrebutted claim of reversible error in the unrecorded summation. This case should be considered simultaneously with the *Hardy* case and the *Strauss* case (should that be granted).

It may fairly be said that the principle here at stake, the right to a full record for appeal purposes, is an extension of the constitutional right to procedural due process. That principle needs implementation both here and in the *Hardy* case, for the very liberties of the petitioners are dependent thereon. Such implementation is a peculiarly appropriate exercise of this Court's power to supervise the administration of criminal justice in the federal courts. Equal justice in the law—including equal justice in the administration of the Court Reporter Act—demands that these petitioners, even though non-indigent, be accorded their due rights.

To the extent that the matter was not timely raised in the court below by petitioners' appellate counsel (who were not their trial counsel), petitioners submit that they themselves are without fault and should not be penalized for counsel's failure to detect the breakdown in the court reporting system at the earliest date possible. Cf. *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633-634, 646-647. The responsibility in this respect must be shared by the appellate court below, which purported to review *all* the record when *all* the record was not before it. See petition for certiorari, pp. 12-13. In this context, as in the habeas corpus set-

ting in the recent opinion in *Sanders* v. *United States*, No. 202, April 29, 1963, "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."

For these reasons, the orders of April 15, 1963, should be vacated and a writ of certiorari issued or, alternatively, a writ of mandamus issued.

Respectfully submitted,

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May 10, 1963

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

Eugene Gressman